Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-165

GEORGIA MAE DOWNS,
PETITIONER

v.

ROBERTA SAWTELLE, DAVIS GOODINE, DR. JOHN B. CURTIS, MILO COMMUNITY HOSPITAL, MARILYN B. DOW, MARY LOU PATTISON, RUTH A. HAGAN, CARL CARLSON AND AVA STROUT,
RESPONDENTS

Brief of Ruth A. Hagan, Marilyn B. Dow, Mary Lou Pattison and John B. Curtis, M.D. in Opposition to Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Brief of Ruth A. Hagan, Marilyn B. Dow, Mary Lou Pattison and John B. Curtis, M.D. in Opposition to Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

This brief is submitted on behalf of the Respondents Ruth A. Hagan, Marilyn B. Dow, Mary Lou Pattison and John Curtis, M.D.

ARGUMENT

THE OPINION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER AND DOES NOT REPRESENT A DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The cross-petitioner argues that this Court's decision of the question presented in her cross-petition will provide guidance to the lower federal courts as to whether and under what conditions non-racial classes are protected under 42 U.S.C. §1985(3). The cross-petitioner maintains that this Court's notation in *Griffin v. Breckenridge*, 403 U.S. 88, 102 fn. 9 (1970), that it was not deciding whether a conspiracy based on an invidiously discriminatory animus other than racial bias would be actionable, has left the lower federal courts struggling with this unanswered question. The cross-petitioner points to no post-*Griffin* decisions which hold that only those conspiracies motivated by racial bias are actionable under §1985(3).

The so-called unanswered question with which the lower federal courts have had to deal is not whether or not only racial bias can form the basis of a §1985(3) action, but whether, given the facts of each particular case, the plaintiff is a member of a class and that an invidiously discriminatory animus toward the class motivated the alleged conspirators' actions. The Fifth Circuit in *McLellan v. Mississippi Power and Light Co.*, 545 F.2d 919, 928-929 (5th Cir. 1977), recognized that "...§1985(3) will not be extended to every class which the artful pleader can contrive." The court noted its earlier rejection of an

alleged class of persons who had been put on employers' black lists because they had filed workmen's compensation claims in *Jacobson v. Industrial Foundation of the Permian Basin,* 456 F.2d 258 (5th Cir. 1972), and noted the First Circuit decision in *Bricker v. Crane*, 468 F.2d 1228 (1st. Cir. 1972), which denied class status to physicians allegedly discriminated against because they testified adversely to their brethren in malpractice cases. The basis of decision in these cases denying class status to the respective plaintiffs was not the fact that they were not members of a racially defined class.

The court below did not decide that only racial bias would form the basis of a viable §1985(3) action. The court merely held that the cross-petitioner had "...failed to present authority for her assertion that the deaf constitute a class for the purposes of 42 U.S.C. §1985." (Cert. App. 39). The decision represents a factual finding by the court and cannot be construed as a decision that only racial bias can form the basis of a §1985(3) action particularly in view of the fact that the court referred to its earlier decision in *Bricker v. Crane, supra.*, in which it relied on this Court's decision in *Griffin,* "...that there must be some racial, *or perhaps otherwise class based invidiously discriminatory animus* behind the conspirators' action." (emphasis added) 468 F.2d at 1232.

The Respondents recognize that this Court's rule of practice under which it will not lightly reverse concurrent findings of fact by a district court and court of appeals, *Alabama Power Co. v. Ickes,* 302 U.S. 464 (1938), may not apply where constitutional claims may depend on their resolution by this Court, *Berenji v. District Director, Immigration and Naturalization Service,* 385 U.S. 630 (1967). However, cross-petitioner's arguments presenting a historical perspective regarding the position of deaf persons in society does not provide a sufficient basis upon which to reverse the findings of the court of appeals, since no testimony or other evidence of this nature was before

the district court when it granted summary judgment on behalf of the respondents on the §1985(3) claim.

The decision as to whether or not the deaf constitute a class for purposes of §1985(3) need not be made by this Court, since the court below, while assuming that the deaf constituted a protected class, could not find, after drawing all permissible inferences most favorable to the cross-petitioner, that any of the alleged discriminatory actions against her were motivated by her membership in that class. (Cert. App. 39). None of the inferences raised by the court below and specifically those inferences restated in the cross-petition (Cert. Cross-Pet. 17-18) establish that the actions of the respondents were motivated by an invidiously discriminatory animus toward the cross-petitioner because she was a member of a class of deaf persons. Nothing contained in the record which was before the district court when it granted summary judgment, and, although not relevant to a review of the summary judgment, nothing contained in the record before the district court at the trial, would give rise to the inferences which the cross-petitioner now attempts to draw from the record (Cert. Cross-Pet. 19). The cross-petitioner has not asked this Court to review the facts found or inferences drawn by the court of appeals but rather seeks to build upon those inferences yet another level of inferences for which there is no basis in the record.

The other so-called controversy among the lower federal courts which the cross-petitioner requests this Court to resolve is whether or not §1985(3) gives a cause of action for private conspiracies to deprive others of rights flowing only from the Fourteenth Amendment. (Cert. Cross-Pet. 8-9). The cross-petitioner candidly admits that the facts of this case avoid a direct confrontation with this issue. (Cert. Cross-Pet. 9). Although this Court, in *Griffin*, found that §1985(3) reaches private conspiracies and that on the facts of that case the congressional power to reach such private conspiracies was founded on §2 of the Thir-

teenth Amendment and its power to protect by appropriate legislation the rights and privileges of National citizenship, 403 U.S. 104-106, the Court did not consider the scope of Congress' power under §5 of the Fourteenth Amendment. Nevertheless, none of the pleadings in this case raised as an issue whether or not §1985(3) would apply to the conspiracy which cross-petitioner alleged in her Complaint. Consequently, the issue was never argued, briefed or decided at either the district court or court of appeals level. There was no decision of this issue which could properly be before this Court for review.

Conclusion

The court of appeals decision is clearly in accord with this Court's decision in *Griffin*. The court of appeals did not hold that only racial bias will form the basis of a §1985(3) action, nor did it hold that Congress did not have the power under §5 of the Fourteenth Amendment to create the §1985(3) cause of action for private conspiracies to deprive persons of rights flowing from the Fourteenth Amendment. Since the court of appeals did not decide these issues, there is nothing for this Court to review. The cross-petition for certiorari should be denied.

Respectfully submitted,

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